Decision 05-07-037 July 21, 2005

#### BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Order Instituting
Investigation and Order to Show Cause on the
Commission's own motion into the operations
and practices of Fan Ding (aka Ding Fan or Lisa
Ding), an individual doing business as Lucky
Moving Co., Lucky Movers, Jixiang Moving Co.,
Northam Immigration Services, and Northman
Immigration Service,

Investigation 04-07-003 (Filed July 8, 2004)

Respondent.

<u>Fan Ding</u>, for Lucky Moving Company/Lucky Movers, respondent.

<u>Gregory Heiden</u>, Attorney at Law, for Consumer Protection and Safety Division.

### OPINION IMPOSING FINE AND COSTS OF INVESTIGATION

# I. Summary

This decision imposes a \$4,500 fine and a \$9,500 assessment for investigative costs on Fan Ding (Respondent), an individual doing business as Lucky Moving Co., Lucky Movers, Jixiang Moving Co., Northam Immigration Services, and Northam Immigration Service.

# II. Background

Respondent applied for a household goods carrier permit on March 21, 2002, on August 27, 2002, and most recently on February 27, 2004. The Commission's License Section denied the first two applications on August 2, 2002, and February 20, 2003, respectively, for failure to file evidence of

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public liability, cargo and workers' compensation insurance coverage, failure to supply required documents, and failure to successfully complete the required MAX 4 examination. License Section notified Respondent on March 15, 2004, and again on April 14, 2004, that her third, pending application cannot be processed, and may be denied, for the same reasons that the first two applications were denied.

Meanwhile, on February 18, 2004, the Commission filed a complaint against Respondent in the Superior Court for the City and County of San Francisco, alleging that Respondent:

- Violated Pub. Util. Code § 5314.51 by advertising and holding out to the public that it is in operation as a household goods carrier, without a valid permit;
- Violated Pub. Util. Code §§ 5139 and 5161 by failing to procure, maintain and file proof of adequate liability protection and cargo insurance while conducting operations as a household goods carrier;
- Violated Pub. Util. Code § 5135.5 by failing to procure, maintain and file proof of workers' compensation insurance coverage while conducting operations as a household goods carrier;
- Violated Pub. Util. Code § 5133 by conducting operations as a household goods carrier without a permit; and
- Violated Pub. Util. Code §§ 5135 and 5139, and Item 88 of MAX 4, by falsely displaying another household goods

<sup>&</sup>lt;sup>1</sup> Unless otherwise indicated, all citations are to the Public Utilities Code.

carrier's permit, and by falsely displaying the Better Business Bureau logo, in its advertising.

The complaint sought a temporary restraining order, a preliminary injunction, and civil penalties. The court issued a temporary restraining order on March 11, 2004, and a preliminary injunction on April 12, 2004, barring Respondent from operating without a license and removing, without prejudice, the Commission's request for monetary fines and sanctions from the court calendar.

On July 8, 2004, the Commission instituted this investigation into Respondent's operations and practices. The OII directed Respondent to show cause why her pending application for a household goods carrier permit under Pub. Util. Code § 5135 should not be denied for cause and lack of fitness in view of the alleged violations listed above, and in view of the alleged continuation of those violations since the court issued the temporary restraining order and preliminary injunction. In addition, the OII indicated the Commission would consider whether to impose fines for such violations.

# III. Procedural History

A prehearing conference (PHC) was held on August 26, 2004, to address the schedule, the issues, and the procedural requirements for Respondent to defend herself against the allegations set forth in the OII. At the PHC, the parties agreed to stipulate to the admission of prepared testimony into the record, to forego evidentiary hearings, and to submit the matter upon the filing of

concurrent briefs.<sup>2</sup> A scoping memo and order was issued on September 1, 2004, memorializing the procedural schedule.

On November 1, 2004, before the time for filing testimony or briefs, the Consumer Protection and Safety Division (CPSD) and Respondent filed a joint motion for Commission adoption of a proposed settlement. The settlement states that Respondent does not challenge CPSD's evidence of her illegal operations, and that she admits to conducting over 100 moves without a permit. Under the terms of the settlement, Respondent would pay a \$4,500 fine plus \$9,500 in investigative costs, in four payments over the course of a year, and agreed to be in full compliance with the law in the future. The settlement also states that, if Respondent fails to comply with any provision of the settlement or violates any Commission rules and regulations, CPSD may seek further fines and penalties.

Based on this record, the presiding officer submitted to the Commission, for resolution at the January 27, 2005, business meeting, a draft decision approving the settlement and closing the proceeding.

On January 26, 2005, CPSD informed the Assigned Commissioner that it intended to file a petition to set aside submission; the agenda item was held pending filing and resolution of such petition. On February 8, 2005, CPSD filed a

<sup>2</sup> By motion filed August 30, 2005, CPSD moved to admit into evidence (1) the

<sup>&</sup>quot;Affidavit in Support of a Probable Cause Finding for Termination of Telephone Service;" (2) a collection of documents consisting of the court case printout, preliminary injunction, temporary restraining orders, and filings and supporting declarations on behalf of the California Public Utilities Commission in San Francisco Superior Court, Case No. 04-428873; and (3) the "Declaration of William G. Waldorf Re: Cost of Investigation." The motion is granted.

petition to set aside submission and withdraw from the settlement. CPSD alleged, and provided declarations in support of its allegations, that Respondent had violated the settlement by continuing to advertise and offer household goods carrier services without a valid household goods carrier permit.

By ruling dated February 24, 2005, the presiding officer set aside submission. An evidentiary hearing was held on March 23, 2005, at which (1) Respondent's counsel's unopposed motion to withdraw as counsel was granted, (2) Respondent offered testimony in response to CPSD's further allegations, and (3) Respondent and CPSD presented their respective summations of the record and recommendations, upon which the matter was submitted.

#### IV. Positions of the Parties

CPSD alleges that Respondent committed the following violations after entering into the settlement:

- (1) Respondent answered calls to two phone numbers listed in a Lucky Moving advertisement in the April 2004 issue of the SBC Smart Yellow Pages, confirmed that the caller had reached Lucky Moving, and quoted a rate to conduct a household goods move; CPSD asserts that these actions violate the prohibition in Pub. Util. Code § 5313.5 against holding oneself out to the public as a household goods carrier, without a valid permit; and
- (2) Respondent answered, and provided rate quotes or otherwise offered to provide services in response to, calls to phone numbers listed in advertisements in the SBC Smart Yellow Pages for Liu's Moving and Express Moving Company; CPSD asserts that these actions violate the prohibition in Pub. Util. Code § 5311(a) against any officer, director, agent or employee of a household goods carrier violating, or abetting a household goods carrier in violating,

any provision of the Household Goods Carrier Act or any Commission rule or regulation.

CPSD recommends that the Commission adopt the fine and costs previously agreed to by the parties in the settlement. Furthermore, CPSD recommends that the Commission impose an additional \$5,000 fine for Respondent's violation of Pub. Util. Code § 5313.5, and an additional \$2,000 fine for Respondent's violations of Pub. Util. Code § 5311(a). Finally, CPSD recommends that all fines and costs be due and payable immediately.

Respondent does not object to the fine and costs previously agreed to by the parties. Respondent denies the further allegations on the basis that she had ceased all operations as a household goods carrier, and that her services on behalf of other movers did not constitute operating as a household goods carrier. Furthermore, Respondent objects to immediate payment of the entirety of the fines and costs on the basis that she does not have the resources to make such payment.

# V. Operating Without a Permit

The facts show that, pursuant to a July 13, 2004, finding of probable cause of the San Francisco Superior Court, all phone numbers listed in the SBC Smart Yellow Pages advertisements for Lucky Moving were disconnected for being used in connection with unlicensed household goods carrier operations. The facts also show that the telephone company mistakenly reactivated two of the Lucky Moving phone numbers in response to a request by Zhi Yuan Zhang, an individual doing business as Express Moving Company.

It is undisputed that Respondent answered and offered rate quotes in response to calls to the previously disconnected phone numbers listed in the Lucky Moving advertisements. However, the totality of the evidence shows that

Respondent's offers of moving services by Lucky Moving were made on behalf of Express Moving Company, not by Respondent operating as a separate household goods carrier.

By the time Respondent entered into the proposed settlement, she had stopped operating Lucky Moving Company, and had sold the company's moving trucks to Zhang. Having sold the moving trucks, Respondent no longer owned the necessary assets for operating a moving company. Since that time, Respondent has assisted Zhang in the operation of his business by answering calls inquiring after moving services. Respondent testified that the phone numbers previously used by Lucky Moving and answered by her in the sting calls had been transferred to Express Moving; this assertion is corroborated by the fact that Zhang, not Respondent, requested and obtained the reactivation of the Lucky Moving phone numbers from SBC. Respondent, under the title of office manager, signed a contract to place an advertisement for Express Moving in the SBC Smart Yellow Pages. Respondent sometimes receives direct cash payment from Zhang for her services.

Based on the totality of this evidence, we find that Respondent ceased her operation of Lucky Moving and that her further activity in connection with the previously disconnected Lucky Moving phone numbers was on behalf of Express Moving. Accordingly, we do not find that Respondent operated as a household goods carrier without a permit in violation of § 5313.5 since entering into the settlement.

CPSD argues that Respondent's representation that she ceased to operate as Lucky Moving is contradicted by the fact that she answered calls to phone numbers listed in Lucky Moving advertisements, confirmed that the calling party had reached Lucky Moving, and under those circumstances provided a

rate quote. CPSD points to the additional evidence that Respondent stated, in response to a sting call described in the declaration of CPSD declarant Burgie Burgess, that Lucky Moving was her company. These facts do not demonstrate that Respondent operated Lucky Moving as a household goods carrier independent of Express Moving.

The Lucky Moving advertisements at issue are in the April 2004 editions of the SBC Smart Yellow Pages; they were placed before Respondent entered into the proposed settlement, and necessarily continue to exist for a time regardless of whether Lucky Moving continued in operation. Respondent's confirmation that a caller, having dialed a phone number listed in the Lucky Moving yellow pages advertisement, had indeed reached Lucky Moving, and her offer of a rate quote are consistent with the activity of an employee and does not demonstrate ownership or independent operation as a household goods carrier.

We reject CPSD's argument that Respondent admitted ownership of Lucky Moving in the sting call by CPSD staff. The only evidence in the Burgess declaration that addresses the issue of Lucky Moving's ownership is the statement that Respondent answered "yes" in response to Burgess asking "if she has several moving businesses." Although the question and answer were in reference to Lucky Moving, Liu's Moving, and Express Moving, neither CPSD nor the record suggests that this proves ownership of Liu's Moving or Express Moving. We do not find that this statement proves ownership of Lucky Moving any more than we find that it proves ownership of Liu's Moving or Express Moving.

CPSD points to the Burgess declaration, which states that Respondent told him that Lucky Moving, Express Moving and Liu's Moving are different companies with different rates and that the rate quote she had provided earlier would only apply to Lucky Moving, as proof that Respondent continued to operate Lucky Moving. Respondent denies having made such a representation. Under the circumstances and the totality of the evidence, including Respondent's lack of proficiency in English, we decline to rely on this contradictory evidence.

CPSD points out that Respondent admits she did not sell the company known as Lucky Moving, but only its assets. CPSD argues that this confirms that Lucky Moving is still in existence and therefore liable for violations. We are not persuaded that, having done business as Lucky Moving, Respondent is therefore liable for violations of Pub. Util. Code § 5313.5 by other persons in the name of Lucky Moving. However, as discussed below, Respondent is liable under Pub. Util. Code § 5313 for abetting Zhang's operation as Lucky Moving.

# VI. Abetting a Household Goods Carrier in Violating the Household Goods Carrier Act

We do not find that Respondent violated Pub. Util. Code § 5311(a) or Pub. Util. Code § 5313³ by abetting Express Moving Company or Liu's Moving in operating as household goods carriers without a permit, as the record does not support a finding that either of these companies is operating without a permit. We do, however, find that Respondent violated the statute by abetting Zhang and Express Moving Company in holding itself out as the unlicensed Lucky Moving Company.

<sup>&</sup>lt;sup>3</sup> Although CPSD refers only to Pub. Util. Code § 5311(a), § 5313 contains the identical prohibition as same Pub. Util. Code § 5311(a). Pub. Util. Code § 5311(a) provides for criminal penalties, while § 5313 provides for civil penalties.

# A. Call to Express Moving Company

CPSD argues that Respondent violated Pub. Util. Code § 5311(a) by offering to provide a household goods move on behalf of Express Moving Company. Pub. Util. Code §§ 5311(a) and 5313 make every officer, director, agent, or employee of a household goods carrier liable for violations of the Household Goods Carrier Act and Commission regulations, regardless of whether the agent or employee commits the violation herself or abets the household goods carrier in committing the violation.

CPSD points to evidence of a sting call to the phone number listed in an SBC Smart Yellow Pages advertisement for Express Moving Company. The evidence shows that CPSD declarant Burgess called Express Moving Company and spoke to Respondent with respect to a possible household goods move, and that Respondent provided a rate quote for the move.

This evidence is not in dispute. Respondent admits that she regularly answers, and offers rate quotes in response to, calls to the phone numbers listed in the Express Moving advertisement. However, CPSD does not explain, and we cannot discern, how answering calls to Express Moving's advertised phone numbers is a violation of the Household Goods Carrier Act or Commission regulations.

Nothing in the record suggests that Express Moving is operating without a permit. To the contrary, CPSD refers, in its petition to set aside submission, to "Zhiyuan Zhang, dba as [sic] Express Movers, a licensed carrier." Nothing in the record suggests that the Express Moving advertisement is illegal. Nothing in the record suggests that the phone number listed in the advertisement was illegal. CPSD, in describing this alleged violation, makes reference to an individual named Bing Yuan, and indicates that she is associated with Express Moving.

However, we do not find evidence of any such association (to the contrary, Respondent testifies there is no such association); nor does CPSD state how such an association might put Express Moving in violation of the Household Goods Carrier Act or Commission regulation.

In sum, we do not find that Respondent's offer to provide household goods carrier services in response to a phone call to Express Moving violated §§ 5311(a) and 5313.

## B. Call to Liu's Moving

CPSD argues that Respondent violated § 5311(a) by offering to provide a household goods move on behalf of Peng Liu, an individual doing business as Liu's Moving. As evidence of this violation, CPSD refers to Burgess's declaration that he called the phone number listed in an SBC Smart Yellow Pages advertisement for Liu's Moving and spoke to Respondent, who confirmed that he had reached Liu's Moving as advertised in the yellow pages. Respondent admits that, since entering into the proposed settlement, she has answered a few phone calls to Liu's Moving, although she has not received payment for doing so.

CPSD asserts that Liu is an unlicensed carrier. CPSD did not offer any evidence of this assertion in its petition to set aside submission or at evidentiary hearing. In combing the formal record of this proceeding, however, we find, attached to an August 25, 2005, motion by CPSD, a declaration by Robert E. DeGroot, Senior Transportation Representative for CPSD, stating that Peng Liu and Liu's Moving do not have operating authority. We decline to rely on this evidence on both factual and procedural grounds.

As a factual matter, the evidence is stale. Seven months passed between the date of this declaration and the hearing to take evidence on this alleged violation. It is possible that Liu's Moving obtained operating authority in the intervening period. Indeed, Respondent testified that Liu told her that he had passed a test to qualify for an operating permit, and that he was awaiting further documents. We do not find on this record that Liu lacks authority to operate as a household goods carrier.

CPSD argues that Respondent was on notice that Liu did not have a license because he was a co-defendant in the San Francisco Superior Court proceeding where Respondent was charged with operating without a license. We reject this argument. First of all, the Superior Court complaint naming Liu as co-defendant was filed in April 2004. Second, the November 2, 2004, final judgment in that proceeding dismisses Peng Liu. Thus this evidence is both stale and inconclusive.

We also decline to consider this evidence on procedural grounds. CPSD's motion, to which this evidence is attached, sought to add Liu doing business as Liu's Moving as a respondent to this proceeding. The November 1, 2004, scoping ruling of the assigned commissioner and administrative law judge denied the motion. It would be unfair and prejudicial to charge the Respondent with responding to these facts alleged against Liu, in a denied motion to add him as a respondent to this case and to account for the allegations against him, as supporting CPSD's further, and much later, allegations against Respondent.

We nevertheless warn Respondent that, had CPSD met its burden of proving that Liu lacks operating authority, we would have found her actions on his behalf to be in violation of §§ 5311(a) and 5313. We also warn Respondent that, if Liu does not have operating authority, any further such actions will be in violation of §§ 5311(a) and 5313.

In conclusion, we do not find on this record that Respondent's offer to provide household goods carrier services in response to a phone call to Liu's Moving violated §§ 5311(a) or 5313.

# C. Calls to Lucky Moving

We find that Respondent violated §§ 5311(a) and 5313 by abetting Zhang and Express Moving in offering moving services in response to calls to previously disconnected phone numbers advertised for Lucky Moving Company. Zhang requested and obtained the reactivation of phone numbers listed in the Lucky Moving yellow pages advertisements that had been disconnected pursuant to court order. Respondent answered calls to the previously disconnected Lucky Moving phone numbers and offered moving services in response to them.

Respondent's testimony that she clarified to the callers that Lucky Moving is now Express Moving is contradicted by Burgess's declaration that Respondent told him that Lucky Moving, Express Moving, and Liu's Moving are different companies. However, even assuming the facts to be as stated by Respondent, her actions violated §§ 5311(a) and 5313. By reactivating the disconnected phone numbers in the Lucky Moving advertisements, Zhang held himself out as Lucky Moving in violation of § 5313.5. By taking calls made to the previously disconnected phone numbers on behalf of Zhang and Express Moving, Respondent abetted Zhang in that violation.

## VII. Fines, Costs and Other Remedies

In view of the superseding events and allegations, we grant CPSD's petition to withdraw from the settlement. We address the merits of the parties' jointly recommended fine and costs in the context of the complete record.

Consistent with §§ 5313 and 5313.5, the Commission's guidelines for determining fines, and other Commission precedent, we conclude that a fine of \$4,500 and \$9,500 in costs is warranted for the violations alleged in the OII. We do not impose any further fine. Payment shall be made in quarterly payments over the course of a year. We do not order disconnection of Respondent's personal cell phone number.

## A. Fines

Pub. Util. Code §§ 5311(a) and 5313 prohibit any household goods carrier and any officer, director, agent or employee of a household goods carrier from violating, or abetting a household goods carrier in violating, any provision of the Household Goods Carrier Act or any Commission rule or regulation. Pub. Util. Code § 5311(a) makes such violation a misdemeanor punishable by a fine of up \$1,000 (\$10,000 if the violation is willful) or one year imprisonment, while § 5313 makes the same violation subject to a civil penalty of not more than \$500.

CPSD recommends a \$1,000 fine for each violation of § 5311(a) since the parties entered into the settlement. CPSD does not justify applying the criminal penalty as opposed to the civil penalty.

To provide guidance in setting fines, the Commission has distilled the principles that it has historically relied upon in assessing fines and restated them such that they may form the basis for future decisions. (Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-088, 84 CPUC 2d 155, 188) (D.98-12-075, App. A.) Those principles begin by stating that the purpose of fines is to deter further violations. In determining whether to impose a fine and, if so, at what level, the

Commission will consider five factors, namely, the severity of the offense, the person's or entity's conduct, the person's or entity's financial resources, precedent, and the totality of circumstances in furtherance of the public interest.

Turning to the first factor, the severity of the offense includes consideration of the economic harm imposed as well as the economic benefit gained. Here, the facts show that Respondent performed over 100 moves as Lucky Moving Company. Thus we conclude that Respondent gained economic benefit over the course of her operations as a household goods carrier. On the other hand, there is no evidence that Respondent's illegal operations imposed any harm on customers.

While there is no evidence regarding whether Respondent economically benefited from the calls to the previously disconnected Lucky Moving phone numbers, we can conclude that there was the potential for such benefit. On the other hand, Zhang is a licensed mover and therefore qualified to conduct any moves that resulted from such calls. We therefore conclude that this violation is extremely minor.

CPSD argues that the severity of Respondent's further offense is aggravated by the fact that it violates the plain language and spirit of the settlement, in which Respondent agreed that she would no longer participate in the moving business. We conclude otherwise.

The settlement states that Respondent may not advertise, or hold herself out, or engage in business as a household goods carrier without a permit. Respondent's activity on behalf of other household goods carriers does not constitute operating as a household goods carrier. The settlement states that Respondent must comply with all pertinent statutes and Commission rules and regulations. To the extent that such activity is on behalf of a licensed carrier –

and this record does not support a finding to the contrary -- Respondent's participation in the moving business is not in violation of the settlement.

More fundamentally, prohibiting Respondent from working for licensed household goods carriers would be unreasonable. CPSD has not shown that Respondent's actions, either before entering into the proposed settlement or since, are so egregious and harmful to the public that she should be barred from a legal means of employment. Accordingly, we do not consider the fact of Respondent's continued participation in the moving business to be an aggravating factor.

The next factor is the person's efforts to prevent, detect, and rectify the violation. In this case, the uncontested facts show that Respondent disregarded four separate letters from CPSD instructing her to cease and desist all unlawful advertising and operations without a permit, by placing numerous advertisements in various newspapers, and violated a temporary restraining order by the San Francisco Superior Court by offering to conduct a move in response to a sting call by CPSD. We conclude that this factor is an aggravation of the offenses alleged in the OII.

With respect to Respondent's offense associated with answering calls to the previously disconnected Lucky Moving phone numbers, we conclude that this violation is so subtle as to be nearly undetectable by Respondent. The phone numbers had been disconnected due to their illegal use by the unlicensed Lucky Moving, but their reactivation was by and for a licensed carrier. Although Zhang, by reactivating the phone numbers, held himself out as the unlicensed Lucky Moving, Lucky Moving was no longer in existence. We also note that Respondent's primary language is Mandarin; it is reasonable to assume that this lack of proficiency in English contributed to Respondent's inability to detect such

a subtle violation. We therefore conclude that Respondent's conduct is not an aggravating factor with respect to this violation.

CPSD argues that Respondent knew that the disconnected phone numbers should not be used for moving services because she was a defendant in the proceeding in which the Superior Court found probable cause to terminate service to those numbers. We are not persuaded. The finding of probable cause was that the phone numbers were being used by unlicensed carriers. Nothing in the finding of probable cause suggests that the phone numbers should not be used in connection with legal moving services.

The next factor is the financial resources of the carrier. Respondent has previously agreed to pay a \$4,500 fine and \$9,500 in costs in four payments over a one-year period, and states that she cannot afford to pay the combined amount immediately in one payment, as opposed to the four quarterly payments as provided in the proposed settlement.

Regarding Commission precedent, we have located decisions where the Commission imposed at least a \$10,000 fine, but the facts of these cases show a pattern of harmful conduct to consumers, facts that are not present here. For example, D.02-05-028, *Re Best Movers*, involved a carrier who provided service during suspension of its permit and when it did not have required insurance coverage; the Commission had received numerous customer complaints against Best Movers for poor service, loss and damage to property, and personal injury. The Commission fined Best Movers \$19,000 (with \$14,000 suspended if the carrier complied with the decision), required restitution payments to customers for loss and damage to furniture, and imposed a three-year probationary period. D.01-08-035, *Re Ace of Bace Moving*, involved a carrier who, among other things, received numerous customer complaints, and exhibited a practice of extracting

unlawful additional amounts for a move by refusing to unload household goods, and a pattern of noncompliance with applicable law and regulations. The Commission ordered Ace of Bace to make reparations to customers for the unlawful charges, and fined the mover \$40,000 (reduced to \$10,000 upon making all required reparations). D.02-08-052, *Re Affordable Apartment Movers*, involved a carrier who provided service after suspension and revocation of its permit, failed to maintain insurance, and violated MAX 4 by, among other things, overcharging on oral estimates. The Commission ordered restitution and fined *Affordable Apartment Movers* \$26,000 (reduced to \$6,500 upon making restitution payments.)

The final factor is the totality of the circumstances in furtherance of the public interest. The public interest is best served by household goods carriers that comply with applicable law and regulations. Where violations do occur, prompt remedial actions are required. The totality of the circumstances includes the fact that Respondent did not immediately comply with either CPSD's cease and desist notices or the Superior Court's temporary restraining order. It also includes the following: (1) Respondent has since ceased operations and no longer seeks operating authority; (2) the only further violation by Respondent is a relatively minor one that is difficult to detect and that, at worst, may have resulted in moves conducted by a licensed mover; and (3) the offending phone numbers have again been disconnected, eliminating the possibility of further misuse of the Lucky Moving advertisements.

Consistent with §§ 5313 and 5313.5, the Commission's guidelines for determining fines, and other Commission precedent, we conclude that a fine of \$4,500 is warranted on the facts of this case. The sum reflects the fine agreed to by the parties in their settlement. We do not impose an additional fine for Respondent's additional violation of §§ 5311(a) and 5313 in consideration of the

factors discussed above as well as the considerable size of the total assessment including the costs discussed below.

#### **B.** Costs

Pub. Util. Code § 5313.5 provides that the Commission may assess the costs of investigation when it finds that a person or corporation has operated or held itself out as a household goods carrier without a valid permit. CPSD provides evidence that the costs of this investigation, not including investigative work since the parties entered into the proposed settlement, totaled \$13,828.75. Respondent agreed to pay \$9,500 pursuant to the parties' settlement. Accordingly, Respondent is ordered to pay the sum of \$9,500 in costs.

## C. Timing of Payment

We make this fine and costs due and payable in four equal installments of \$3,500, with the first payment due within 30 days of the effective date of this Order, and the subsequent payments due every 90 days thereafter. CPSD does not offer any justification for its recommendation that the fine and costs be immediately due and payable in one lump sum. We note Respondent's testimony that she cannot comply with the fine and costs if they are immediately due and payable. We also note that Respondent has appeared at all Commission hearings in this matter, and has testified to her intention to pay the fine and costs ordered by the Commission.

#### D. Disconnection of Cell Phone

Lastly, CPSD recommends that we order the disconnection of Respondent's cell phone number in order to prevent Respondent from abetting the operations of unlicensed household goods carriers. Respondent testified that some of the phone calls that she answered on behalf of Liu's Moving, Express Moving, and other carriers were phone calls that were forwarded to her cell

phone. However, the evidence does not show that any of the forwarded calls are from unlicensed carriers. We reject CPSD's recommendation.

## VIII. Disposition of Appeal

The Presiding Officer's Decision (POD) was filed and mailed on May 20, 2005. CPSD filed a timely appeal on June 20, 2005.

CPSD asserts that the POD is not supported by the evidence in concluding that Respondent acted on behalf of Zhang doing business as Express Moving when she responded to phone inquiries to the previously disconnected phone numbers associated with Lucky Moving. CPSD points to evidence in the record that contradicts the POD's conclusion. The POD in fact addresses the contradictory evidence and explains the basis for its conclusion, and that discussion need not be repeated here. However, we modify the POD to acknowledge further contradictory evidence in the record, and to clarify that the fact that Zhang, not any of the Respondents, requested and obtained reactivation of the previously disconnected Lucky Moving phone numbers is a factor included in the totality of evidence supporting our conclusion.

CPSD claims that the POD factually errs by confusing "Express Moving Services," which CPSD states is the company owned by Zhang, with "Express Moving Company," which CPSD asserts is owned by Bing Yuan, an unlicensed household goods carrier. As evidence of this assertion, CPSD attaches to its appeal License Section records indicating a household goods permit application number for Bing Yuan doing business as "Luckier Moving Company" and "JiXiang Jili Moving Company," and points out that this number appears in the SBC Smart Yellow Pages advertisement for Express Moving Company. The License Section records and the facts they represent are not in the evidentiary record, and CPSD does not request that we take judicial notice of them. We note,

however, that even if it were in the record, this evidence would not prove Bing Yuan's ownership of Express Moving Company. Notwithstanding CPSD's apparent understanding of such a relationship as reflected in its pleadings, in the cross-examination of its staff counsel, and in its oral argument, CPSD has not identified any record evidence that Bing Yuan owns, operates, or claims a relationship with Express Moving Company or with any company with a variation on that name. Indeed, the only record evidence on the issue is Respondent's testimony, in response to a cross-examination question that assumes the fact, that Bing Yuan is *not* associated with Express Moving Company. In any event, to the extent that CPSD believes that Yuan is the owner of Express Moving Company and an unlicensed household goods carrier, it may pursue an action against Yuan. We decline to find, under these facts, that Respondent has abetted Yuan's household goods operations.

CPSD asserts that the POD legally errs in finding that Respondent's actions were on behalf of Zhang because Respondent failed to rebut CPSD's evidence by virtue of (1) allegedly failing to respond to a discovery request for documentation of the sale of her business (an assertion for which CPSD identifies no record evidence), and (2) failing to file a declaration responding to CPSD's allegations as ordered by the Administrative Law Judge. There is no legal error. Respondent appeared and offered testimony at the evidentiary hearing in rebuttal to CPSD's allegations without objection from CPSD, and the POD's factual findings are based upon the evidentiary record, including the record of the evidentiary hearing. To the extent that CPSD believed it necessary to pursue a discovery request or was prejudiced by having to respond to Respondent's oral testimony, it had the opportunity to raise its concerns and pursue its remedies through proper, timely motion.

We reject CPSD's implication that the remedy for Respondent's failure to provide a declaration as ordered is to disregard the testimony given at hearing. Nor do we find it appropriate, under the circumstances of this case, to impose sanctions on Respondent. We note that Respondent's counsel at the time of the ruling moved and was granted leave to withdraw as such, that Respondent is not proficient in English, and that Respondent complied with the order to appear at hearing.

CPSD states the POD factually erred regarding the lack of support in the record for a finding that Liu and Liu's Moving were unlicensed at the time Respondent answered calls to Liu's Moving. CPSD cites to declarations attached to its earlier motion to add Liu as a respondent to this proceeding, to CPSD's statements at evidentiary hearing, and to the Complaint for Temporary Restraining Order and supporting declarations contained in the document entitled "Inv. Fan Ding (aka Ding Fan or Lisa Ding), an individual doing business as Lucky Moving Co., Lucky Movers, [etc.]."

The POD's assessment of the record in this respect is correct. CPSD's motion to add Liu as a respondent was denied, and its accompanying exhibits are not evidence in this record. CPSD offered no testimony at hearing, only the statements of counsel which are not evidence.

However, we modify the POD to grant CPSD's outstanding August 30, 2004, motion to admit into evidence the document entitled "Inv. Fan Ding (aka Ding Fan or Lisa Ding), an individual doing business as Lucky Moving Co., Lucky Movers, [etc.]," as well as the "Affidavit in Support of a Probable Cause Finding for Termination of Telephone Service" and "Declaration of William G. Waldorf Re: Cost of Investigation." Accordingly, we now address CPSD's claim

that the first of these exhibits includes evidence of Liu's and Liu's Moving's unlicensed status.

CPSD states that the exhibit contains numerous cease and desist letters to Liu and Ding. CPSD does not direct the Commission to a particular cite, and our review of the approximately 250 pages of the exhibit reveals numerous cease and desist letters to Ding, but none to Liu. CPSD points out that the temporary restraining order and preliminary injunction contained in the exhibit name Liu as a defendant. However, although the complaint and supporting declarations confirm Respondents' unlicensed status, they are silent on the matter of Liu's status as a household goods carrier.

CPSD attaches to its appeal Liu's recent License Section records indicating that Liu was granted a permit on May 23, 2005, and was unlicensed before that time. These documents and the facts they represent are not in the evidentiary record, and CPSD does not request that we take judicial notice of them. We note, however, that even if the record supported a finding that Respondent abetted Liu's illegal operations, we would consider a carrier's pending application and subsequent licensed status as a mitigating factor in assessing a fine against a third person for abetting the carrier's earlier illegal operations.

CPSD states that the POD is silent regarding the safety violations alleged in the OII. There is no error. The POD's discussion, findings of fact and conclusions of law indicate that the allegations in the OII are undisputed, and the POD adopts a fine and investigative costs in resolution of those allegations.

CPSD states that the POD errs in adopting a fine of \$4,500 and \$9,500 in investigation costs because CPSD's rationale for supporting those amounts in settlement no longer exists. There is no error. The POD adopts the fine and costs

on the basis of the evidentiary record and in consideration of the parties' recommendations. Specifically, CPSD recommends, in its closing argument, that the Commission impose this \$14,000 penalty for the violations alleged in the OII, and an additional \$7,000 in penalties for alleged violations subsequent to the settlement. Respondent did not contest the violations alleged in the OII or the recommended penalty for them, but did contest the additional alleged violations and CPSD's recommendation that all fines and penalties be due immediately.

CPSD asserts that the POD legally errs by failing to consider economic harm to licensed carriers who lost business to Respondent, to customers who were placed at risk for Respondent's failure to maintain insurance, and to customers who may have been overcharged or whose goods may have been damaged by Respondent but who did not file a complaint with the Commission. There is no error. The penalty amount for pre-settlement violations is not in dispute. To the extent that Respondent's later violation -- abetting of Zhang's misuse of the previously disconnected Lucky Moving phone number -- led to moves by Zhang, those moves would have been conducted by a licensed mover. We are not persuaded that the harm to other licensed carriers from business lost to another licensed carrier, albeit due to the improper use of previously disconnected phone numbers, is an aggravating factor for purposes of assessing a fine against Respondent.

CPSD takes issue with the POD's reasoning that the finding of probable cause did not put Respondent on notice that the disconnected phone numbers should not be used in connection with legal moving services. CPSD notes that Pub. Util. Code § 5322(d) prohibits reconnection absent a petition or application for hearing before the Commission. We agree that the statute imposes conditions on reconnection, but the fact remains that disconnected phone numbers were

reconnected at Zhang's request, not the Respondent's. Zhang was not a defendant in the phone disconnect proceeding, and is a licensed carrier. To the extent that CPSD believes that Zhang is in violation of § 5322(d), it may pursue an action against Zhang. We decline to find, under these facts, that Respondent's ability to detect the violation is an aggravating factor for purposes of assessing a fine against her.

CPSD implies that the POD errs in relying on Respondent's testimony that she could not pay the penalty if it is immediately due rather than payable over the course of a year. CPSD states that Respondent provided no evidence in support of her testimony, and attaches to its appeal evidence to rebut Respondent's testimony. This evidence is not in the record and will not be considered. Respondent's sworn testimony, which was subject to cross-examination, constitutes record evidence upon which the POD may properly rely.

CPSD suggests that affirmation of the POD would discourage staff from pursuing enforcement actions and signal that the Commission is not serious about enforcing the Household Goods Carriers' Act. We disagree. We see this investigation and CPSD's related work as successful, both by virtue of having stopped Respondent's illegal operations and, according to CPSD's representation in its appeal, by Liu's achievement of legal status for his household goods operations. We nevertheless remind CPSD that it bears the burden of proving its allegations in enforcement proceedings. The Commission's refusal to find violations of the Act in the absence of proof does not indicate our indifference to enforcing the Act.

# **Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge and the Presiding Officer in this investigation.

# **Findings of Fact**

- 1. In the OII, CPSD accuses Respondent of unauthorized operation as a household goods carrier.
  - 2. Respondent does not dispute the allegations in the OII.
  - 3. Respondent admits to over 100 unauthorized household goods moves.
- 4. Respondent and CPSD jointly moved for Commission adoption of a proposed settlement imposing a \$4,500 fine and \$9,500 in costs in resolution of the allegations in the OII. CPSD has petitioned to withdraw from the proposed settlement.
- 5. Upon entering into the proposed settlement, Respondent ceased operating as a household goods carrier.
- 6. After entering into the proposed settlement, Respondent answered inquiries for household goods moving services on behalf of other household goods carriers.
- 7. The record does not support a finding that any of the household goods carriers for whom Respondent provided services were unlicensed.
- 8. Zhi Yuan Zhang, an individual doing business as Express Moving Company, requested and obtained reactivation of phone numbers listed in SBC Smart Yellow Pages advertisements for Lucky Moving that had been disconnected pursuant to court order.

9. Respondent answered inquiries to the previously discontinued phone numbers listed in the Lucky Moving advertisements on behalf of Zhang doing business as Express Moving Company.

## **Conclusions of Law**

- 1. Respondent should pay \$4,500 fine and \$9,500 in costs as agreed to by the parties in resolution of the undisputed allegations in the OII.
- 2. After entering into the proposed settlement, Respondent violated §§ 5311(a) and 5313 by abetting Zhi Yuan Zhang in holding himself out as the unlicensed household goods carrier Lucky Moving Company. CPSD's petition to withdraw from the proposed settlement should be granted.
- 3. Due to the minor nature of this violation, the difficulty of its detection, and the totality of the circumstances, Respondent should not be further fined for her violation of §§ 5311(a) and 5313.
- 4. Respondent's payment of the fine and costs should be made in equal quarterly payments of \$3,500, with the first payment due within 30 days of the effective date of this decision and the subsequent payments due every 90 days thereafter.
  - 5. Investigation 04-07-003 should be closed, effective immediately.

#### ORDER

#### **IT IS ORDERED** that:

1. Fan Ding, a.k.a. Ding Fan or Lisa Ding, is fined \$4,500 and assessed \$9,500 in investigative costs. Respondent shall pay the fine plus costs in four equal payments of \$3,500, the first being due no later than 30 days after the effective date of this decision, and the subsequent payments being due every 90 days thereafter. Payment shall be made payable to the California Public Utilities

Commission and remitted to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. The number of this decision shall be included on the face of the checks.

- 2. CPSD's petition to withdraw from the proposed settlement agreement is granted.
- 3. CPSD's August 30, 2005, motion to admit into evidence (1) the "Affidavit in Support of a Probable Cause Finding for Termination of Telephone Service;" (2) a collection of documents consisting of the court case printout, preliminary injunction, temporary restraining orders, and filings and supporting declarations on behalf of the California Public Utilities Commission in San Francisco Superior Court, Case No. 04-428873; and (3) the "Declaration of William G. Waldorf Re: Cost of Investigation" is granted, and the exhibits are admitted into evidence.
  - 4. Investigation 04-07-003 is closed.

This order is effective today.

Dated July 21, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners